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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. EARNEST LEE BROWN, Appellant.	)	2 CA-CR 2007-0217 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20051555

Honorable Howard Fell, Judge Pro Tempore

AFFIRMED AS MODIFIED

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E C K E R S T R O M, Presiding Judge.

¶1 Appellant Earnest Brown was convicted after a jury trial of possession of equipment for the purpose of manufacturing a dangerous drug and possession of drug paraphernalia. The trial court sentenced him to mitigated, concurrent prison terms of 4.5 years and one year, respectively. On appeal, Brown argues his conviction for possession of drug manufacturing equipment violated his right to due process, because he was not charged with this crime, and the trial court erred when it designated that offense as a lesser-included offense of drug manufacturing. He also identifies discrepancies between the trial court's orders at sentencing and those recorded in the sentencing minute entry regarding credits for time served, fines, and fees. We order the minute entry be corrected to reflect the actual sentence imposed but otherwise affirm Brown's convictions and sentences.

¶2 "We view the evidence in the light most favorable to sustaining the jury's verdicts." *State v. Miller*, 215 Ariz. 40, ¶ 2, 156 P.3d 1145, 1146 (App. 2007). After a period of surveillance, police entered Brown's house with his consent; they found coiled hoses, bottles with separated liquids inside them, and coffee filters containing a greenish-blue residue—materials all commonly associated with methamphetamine production. A Pima County grand jury subsequently indicted Brown on charges of manufacturing a dangerous drug (count one), possession of equipment for the purpose of manufacturing a dangerous drug (count two), and possession of drug paraphernalia (count three).

¶3 On the first day of trial, the court granted the state's motion to dismiss count two, designated it a lesser-included offense of count one, and renumbered count three as

count two. The jury acquitted Brown of the greater offense of drug manufacturing, proscribed by A.R.S. § 13-3407(A)(4), but found him guilty of the lesser offense of possession of drug manufacturing equipment, a violation of § 13-3407(A)(3).

¶4 On appeal, Brown asserts that his conviction for possession of drug manufacturing equipment violated his due process rights "[b]ecause A.R.S. § 13-3407(A)(3) contains elements not contained in A.R.S. § 13-3407(A)(4)," and thus, "it is not a lesser included offense." But in *State v. Welch*, 198 Ariz. 554, ¶ 12, 12 P.3d 229, 232 (App. 2000), Division One of this court squarely held that possession of drug manufacturing equipment is a lesser-included offense of drug manufacturing. Although Brown claims the court's conclusion in *Welch* "was incorrect," he successfully took the opposite position in an earlier proceeding involving the same offenses and the same prosecutor and judge. Because Brown is estopped from doing so, we do not address the merits of his contention on appeal.

¶5 "Judicial estoppel prevents a party from taking an inconsistent position in successive or separate actions." *State v. Towery*, 186 Ariz. 168, 182, 920 P.2d 290, 304 (1996). The purpose of this doctrine is to prevent litigants from using the judicial system to gain an unfair advantage, which undermines the integrity of the judicial process. *Id.* Estoppel is a discretionary tool a court may employ when (1) the parties are the same, (2) the question involved is the same, and (3) the party asserting the inconsistent position was

successful in the prior proceeding. *State v. Brown*, 212 Ariz. 225, ¶ 13, 129 P.3d 947, 950 (2006); *Towery*, 186 Ariz. at 182, 920 P.2d at 304. That doctrine applies here.

¶6 In an earlier bench trial concerning similar events that took place two months before those in the present case, the court found Brown guilty of drug manufacturing and possession of equipment for the purpose of drug manufacturing. Relying on *Welch*, Brown then successfully moved to vacate his conviction for possession of drug manufacturing equipment, arguing it was a lesser-included offense of drug manufacturing and, therefore, "under double jeopardy [he could not] be convicted of both." In view of that result, the state moved to dismiss count two in the present case "based on the case law provided to [the state] the last time." Having benefitted from the holding in *Welch* on the identical legal question in a prior proceeding involving the same parties, Brown is now precluded from arguing *Welch* was wrongly decided.

¶7 Though Brown urges us not to apply the estoppel doctrine, he has not identified any circumstances which would dissuade us from doing so. *See Brown*, 212 Ariz. 225, ¶ 13, 129 P.3d at 950-51 (not applying doctrine where consideration of merits in public interest). He notes he was represented by different counsel on appeal than at trial and suggests there was no "conspired strategy" between them. Yet the integrity of the judicial process may be compromised whenever one party uses it to gain an unfair advantage, whether using the same counsel or not. And it would be impractical for the operation of this equitable doctrine to depend on something as variable and easily manipulated as

representation by a particular attorney. *See Towery*, 186 Ariz. at 182, 920 P.2d at 304 (judicial estoppel should be applied in criminal context to prevent absurd results). Brown's trial counsel in this case gave every indication he accepted the reasoning and conclusion of *Welch*: he did not object when the court granted the state's motion to dismiss count two or when it converted the charge into a lesser-included offense of count one.

¶8 Although the doctrine of judicial estoppel prevents us from reaching the merits of Brown's underlying claim, we also note that Brown has offered no compelling reason to revisit the holding of *Welch*. *See Neil B. v. McGinnis Equip. Co. v. Henson*, 2 Ariz. App. 59, 62, 406 P.2d 409, 412 (1965) (as unified court, decisions of other division of court of appeals should be followed unless departure justified by "the most cogent of reasons"); *see also State v. Hickman*, 205 Ariz. 192, ¶¶ 37-38, 68 P.3d 418, 426-27 (2003) (departure from precedent demands compelling reasons). We therefore affirm his conviction for possession of equipment for the purpose of manufacturing a dangerous drug.

¶9 Brown has alerted this court to a discrepancy between the trial court's oral pronouncement of sentence and its sentencing minute entry.[1] Both Brown and the state acknowledge that the sentencing form did not accurately record the sentence actually imposed by the court. We therefore order the sentencing minute entry be corrected to reflect

[1]We also note the trial court at sentencing mistakenly referred to counts two and three of the original indictment rather than counts one and two, as modified. But, an erroneous formal written recital of convictions at sentencing is not a sufficient basis for reversal. *See State v. Dowthard*, 92 Ariz. 44, 49, 373 P.2d 357, 360 (1962).

that the trial court actually credited Brown with twenty-three days of presentence incarceration and ordered him to pay a $2,000 fine, a $16 surcharge, and $800 in attorney fees. *See State v. Bowles*, 173 Ariz. 214, 216, 841 P.2d 209, 211 (App. 1992) (remand for clarification of sentence required only if court's intent unclear); *State v. Hanson*, 138 Ariz. 296, 305, 674 P.2d 850, 859 (App. 1983) (appellate court may correct mistake in sentencing minute entry).

¶10 We affirm Brown's convictions and sentence, as corrected.

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PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

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PHILIP G. ESPINOSA, Judge

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GARYE L. VÁSQUEZ, Judge